CHAPTER III. CLAIMANTS

A. PROPER CLAIMANTS

Individuals, private corporations, governmental entities, aliens, and insurance companies may all assert claims against the government under the FTCA. The proper claimant for property loss or damage is either the owner of the property, an authorized agent, or a legal representative.[1] An individual is generally a proper FTCA claimant if state tort law provides a cause of action in negligence. Assignees are barred as claimants by the Anti-Assignment Act[2] unless the assignment occurs by operation of law.[3] Subrogated claims are permitted whether the subrogation occurs by operation of law or by contract.[4] State law determines the validity of subrogation, but subrogated claims are separate claims and should be paid as such.[5]

The injured person, an authorized agent, or a legal representative may present a claim for personal injury.[6] When a minor is the injured person, two causes of action result under the law of most states. One claim belongs to the child and another to the parents for medical

[1] 28 C.F.R. § 14.3(a) (1996); AR 27-20, para. 2-10a.

[2] 31 U.S.C. § 3727 (1994).

[3] United States v. Shannon, 342 U.S. 288 (1952); United States v. Aetna Surety Co., 338 U.S. 366 (1949); AR 27-20, para. 2-10g(1).

[4] 28 C.F.R. § 14.3(d) (1996); AR 27-20, para. 2-10eb.

[5] Robinson v. United States, 408 F. Supp. 132 (N.D. Ill. 1976).

[6] 28 C.F.R. § 14.3(b) (1996); AR 27-20, para. 2-10-b(1).

expenses and loss of services. State law determines who may present the claim on behalf of the child. Derivative claims are separate and must be filed as such.[7]

The executor or administrator of the decedent's estate or any other person legally entitled to assert such a claim under the applicable state law may present a claim based upon death.[8] The amount allowed will, to the extent practicable, be apportioned among the beneficiaries as required by the applicable law.

The types of claims that can be filed under the FTCA by federal civilian employees and active duty military personnel are limited. These limitations stem from the theories that alternative remedies are available or that the claimant's action against the United States might disrupt agency operations.

B. CIVILIAN EMPLOYMENT BAR TO LIABILITY

Civilian employees of the United States receive workers' compensation coverage under the Federal Employees' Compensation Act (FECA).[9] FECA provides compensation where the federal employee is killed or injured "while in the performance of . . . duty." FECA bars FTCA

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[7] Dupont v. United States, 980 F. Supp. 192 (S.D. W. Va. 1997) (husband's claim for loss of consortium is separate and distinctive and cannot be raised at trial in absence of filing an administrative claim); Rode v. United States, 812 F. Supp. 45 (M.D. Pa. 1992) (failure to include spouse in administrative claim precludes addition of spouse on filing of suit); Hunter v. United States, 417 F. Supp. 272 (N.D. Cal. 1976); Green v. United States, 385 F. Supp. 641 (S.D. Cal. 1974); Collazo v. United States, 372 F. Supp. 61 (D. P.R. 1973).

[8] 28 C.F.R. § 14.3(c) (1996); AR 27-20, para. 2-10-b(2); Reese v. United States, 930 F. Supp. 1537 (S.D. Ga. 1995) (mother of deceased motorist has standing to bring wrongful death action on behalf of deceased's unborn fetus).

[9] 5 U.S.C. §§ 8101-8151 (1994). "Employee" is defined broadly and includes all civil officers and employees of the government and its instrumentalities, volunteers, employees of the District of Columbia, ROTC Cadets, Peace Corps volunteers, and most student interns. *See also* Joseph H. Rouse, *Reserve Officer Training Corps (ROTC) Cadet Training Injuries*, ARMY LAW., Mar. 1999, at 47 (discussing FECA application to ROTC cadets).

claims based on the initial injury and any medical treatment stemming from the injury.[10] Like most workers' compensation statutes, the employee may recover regardless of government negligence or his own contributory negligence, but the employee forfeits the right to further recovery from the government. FECA is an exclusive remedy for appropriated fund employees for personal injury or death,[11] but not for property losses.[12]

Litigation involving FECA usually turns on whether the employee was "in the performance of . . . duty" at the time of the injury. A government employee who is not performing duties and is injured by government negligence may file an FTCA claim like any other citizen.[13] FECA coverage extends to all injuries within the work "premises."[14] Generally, if an employee has fixed times and places of work, all injuries sustained during breaks, during the lunch hour, and within the confines of the federal property while traveling to and from work, will be covered by FECA.

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[10] Lance v. United States, 70 F.3d 1093 (9th Cir. 1995).

[11] 5 U.S.C. § 8116(c) (1994). *See* Patterson v. United States, 359 U.S. 495 (1959); Johansen v. United States, 343 U.S. 427 (1952); Woodruff v. U.S. Department of Labor, 954 F.2d 634 (11th Cir. 1992) (employee in on-post collision is covered by FECA while going off post to buy a sweater during lunch break); Schmid v. United States, 826 F.2d 227 (3d Cir. 1987) (FECA coverage for employee playing softball after duty hours); Grijalva v. United States, 781 F.2d 472 (5th Cir. 1986), *cert. denied*, 479 U.S. 822 (1986); Heilman v. United States, 731 F.2d 1104 (3d Cir. 1984); Cobra v. United States, 384 F.2d 711 (10th Cir. 1967), *cert. denied,* 390 U.S. 986 (1968); Soderman v. U.S. Civil Service Commission, 313 F.2d 695 (9th Cir. 1962), *cert. denied,* 372 U.S. 968 (1963).

[12] 31 U.S.C. § 3721 (1994); Holcombe v. United States 176 F. Supp. 297 (E.D. Va. 1959), *aff'd,* 277 F.2d 143 (4th Cir. 1960). This limitation also does not bar third party indemnity claims against the United States. Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983).

[13] Martin v. United States, 566 F.2d 895 (4th Cir. 1977); Holst v. United States, 755 F. Supp. 260 (E.D. Mo. 1991) (USPS employee injured while picking up paycheck on day off is not covered under FECA).

[14] Woodruff v. U.S. Department of Labor, 954 F.2d 634 (11th Cir. 1992) (employee in on-post collision is covered by FECA while going off post to buy a sweater during lunch break).

Any "substantial question" of FECA coverage must be resolved before an FTCA claim may be litigated.[15] The Civilian Personnel Officer is initially responsible for processing FECA claims. The Office of Workers' Compensation Programs (OWCP) investigates and rules on FECA coverage issues; employees may appeal OWCP rulings to the Employees' Compensation Appeals Board. The Secretary of Labor then has final review authority on FECA coverage; no judicial review is allowed.[16] The two-year FTCA statute of limitations is not tolled during the resolution of the FECA coverage issue by the Department of Labor,[17] but the U.S. Army Claims Service will hold a timely filed tort claim in abeyance until the FECA issue is resolved.[18]

Employees of nonappropriated fund activities receive workers' compensation under the Longshoremen's and Harbor Workers' Compensation Act.[19] This act contains compensation and exclusivity provisions similar to those found in FECA.[20]

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[15] Figueroa v. United States, 7 F.3d 1405 (9th Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994); Tarver v. United States, 25 F.3d 900 (10th Cir. 1994); Reep v. United States, 557 F.2d 204 (9th Cir. 1977); Joyce v. United States, 474 F.2d 215 (3d. Cir. 1973).

[16] 5 U.S.C. § 8128 (1994); Blair v. Secretary of Army, 51 F.3d 279 (9th Cir. 1995); Tarver v. United States, 25 F.3d 900 (10th Cir. 1994); Grijalva v. United States, 781 F.2d 472 (5th Cir. 1986), *cert. denied*, 479 U.S. 822 (1986).

[17] Gunston v. United States, 235 F. Supp. 349 (N.D. Cal. 1964), *aff'd*, 358 F.2d 303 (9th Cir.), *cert. denied*, 384 U.S. 993 (1966).

[18] *See Claims Notes*, ARMY LAW., Dec. 1987, at 48.

[19] 38 U.S.C. §§ 901-950 (1994); 5 U.S.C. § 8171 (1994).

[20] Employees' Welfare Commission v. Davis, 599 F.2d 1375 (5th Cir. 1978); United States v. Forfari, 268 F.2d 29 (9th Cir. 1969), *cert. denied*, 361 U.S. 902 (1969); Dolin v. United States, 371 F.2d 813 (6th Cir. 1967); Aubrey v. United States, 254 F.2d 768 (D.C. Cir. 1958).

FECA is the exclusive remedy for federal workers injured on the job, even if FECA does not pay benefits for certain types of injuries. The following case illustrates the application of this principle.

Posegate v. United States
288 F.2d 11 (9th Cir. 1961)

[Donald Posegate, a civilian employee on a military artillery range, was severely injured when caught under a nine-ton field piece. Among the consequences of the accident was that Posegate was rendered permanently impotent. Posegate applied for and received FECA benefits. No benefits were authorized for the permanent impotence. Both parties admit no FECA recovery for permanent impotence is authorized. Posegate sued under the Tort Claims Act. The government defended on the basis of the exclusivity provision of FECA.]

> Appellants' contention is that though Donald has received hospitalization, surgery and medical treatment from the date of the injury and though an award has been made to him, this award is only for some of the injuries which he has received. He claims that his present condition of permanent impotence is a non-disabling injury, that he has received no compensation for this injury, and that he has been advised by the Bureau of Employees' Compensation of the United States Department of Labor that "[c]ompensation under the Federal Employees' Compensation Act is based on loss of wage earning capacity. There is no provision in the law to cover the condition you mentioned." He therefore contends that he has the right to sue the United States under the Federal Tort Claims Act for the negligence of its agents which proximately caused the serious but non-disabling injuries complained of. We do not agree.
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> Similar claims have arisen under state workmen's compensation and similar statutes, and recovery in these cases has been denied. *Hyett v. Northwestern Hospital*, 1920, 147 Minn. 413, 180 N.W. 552 (sexual powers reduced); *Farnum v. Garner Print Works*, 1920, 229 N.Y. 554, 129 N.E. 912 (unable to beget children); *Freese v. John Morrell & Co.*, 1931, 58 S.D. 237 N.W. 886 (loss of testicle-pain and suffering).
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> In *Smither & Co., Inc. v. Coles*, 1957, 100 U.S. App. D.C. 68, 242 F.2d 220, which was an action by a wife for loss of consortium after her husband had received the maximum benefits under the District of Columbia Workmen's Compensation Act, the court said:
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> > The history of the development of statutes, such as this, creating a compensable right independent of the employer's negligence and notwithstanding an employee's contributory negligence, recalls that the keystone was the exclusiveness of the remedy. This concept emerged from a balancing of the sacrifices and gains of both employees and employers, in which the former relinquished whatever

> rights they had at common law in exchange for a sure recovery under the compensation statutes, while the employers on their part, in accepting a definite and exclusive liability, assumed an added cost of operation which in time could be actuarially measured and accurately predicted; incident to this both parties realized a saving in the form of reduced hazards and cost of litigation. As stated by Mr. Justice Brandeis in *Bradford Electric Co. v. Clapper*, 1932, 286 U.S. 145, 159, 52 S.Ct. 571, 576, 76 L.Ed. 1026, the purpose of these laws was to provide 'not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinative.' "
>
> The language of §§ 751(a) and 757(b) of the Federal Employees' Compensation Act as quoted above is plain and unambiguous. Under the statute the employee, regardless of any negligence, is to receive in case of injury certain definite amounts, which recovery "shall be exclusive, and in place, of all other liability of the United States." His recovery is not dependent upon the injury being caused by the negligence of any employees of the United States, nor is it reduced or taken from him if the injury is the result of his own negligence. That the remedy provided by the Federal Employees' Compensation Act is to be exclusive is shown by the legislative history of Congress at the time the statute was amended in 1949. . . .
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> It thus appears that neither the plain language of the statute, its legislative history, nor the prior construction of similar statutes permits a recovery by appellant. Donald Posegate was a "person protected by the act." He received medical treatment and substantial payments under the Federal Employees' Compensation Act as a result of the accident in question. We hold that he cannot recover under the Federal Tort Claims Act for his claimed non-disabling injury.

FECA coverage not only bars an initial FTCA claim, it can also bar a later claim based on malpractice during treatment of a FECA-covered injury[21] or claims by persons treated as military dependents who are also civilian employees.[22] It is irrelevant to the FTCA bar that the

[21] Scheppan v. United States, 810 F.2d 461 (4th Cir. 1987) (PHS official claim for negligent medical treatment barred).

[22] McCall v. United States, 901 F.2d 548 (6th Cir. 1990), *cert. denied*, 498 U.S. 1012 (1990) (FECA coverage bars medical malpractice for on-the-job injury of federal employee even though surgery was furnished on the basis employee was a military dependent).

injured employee did not request FECA coverage for the injuries sustained; the bar applies to all work-related injuries.[23]

C. MILITARY CLAIMANTS - "INTRAMILITARY TORT IMMUNITY"

The most difficult and controversial FTCA claimant cases involve military personnel. The statute itself does not exclude service personnel as claimants; however, two early Supreme Court decisions limit the claims that may be raised by military personnel.

Brooks v. United States
337 U.S. 49 (1949)

> This is a suit against the United States under the Federal Tort Claims Act, 28 U.S.C.A. § 921 [Aug. 2, 1946] 60 Stat. 812, 842, c 753, now 28 U.S.C. (1948 ed.) § 2671. The question is whether members of the United States Armed Forces can recover under the Act for injuries not incident to their service. The District Court for the Western District of North Carolina entered judgment against the government, rendering an unreported opinion, but the Court of Appeals for the Fourth Circuit reversed, in a divided decision. 169 F.2d 840. We brought the case here on *certiorari* because of its importance as an interpretation of the Act.
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> The facts are these. Welker Brooks, Arthur Brooks, and their father, James Brooks, were riding in their automobile along a public highway in North Carolina on a dark, rainy night in February 1945. Arthur was driving. He came to a full stop before entering an intersection, and proceeded across the nearer land of the intersecting road. Seconds later the car was struck from the left by a United States Army truck, driven by a civilian employee of the Army. Arthur Brooks was killed; Welker and his father were badly injured.
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> Welker and the administrator of Arthur's estate brought actions against the United States in the District Court. The District Judge tried the causes without a jury and found negligence on the part of the truck driver. The government moved to dismiss on the ground that Welker and his deceased brother were in the armed forces of the United States at the time of the accident, and were therefore barred from recovery. The court denied the motion, entering a $25,425 judgment for the decedent's estate, and a $4,000 judgment for Welker. On appeal, however, the

[23] Figueroa v. United States, 7 F.3d 1405 (9th Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994).

government's argument persuaded the Court of Appeals to reverse the judgment, Judge Parker dissenting.

We agree with Judge Parker. The statute's terms are clear. They provide for District Court jurisdiction over any claim founded on negligence brought against the United States. We are not persuaded that "any claim" means "any claim but that of servicemen." The statute does contain twelve exceptions. § 421, 28 U.S.C.A. § 943; now 28 U.S.C. 1948 ed. § 2680. None exclude petitioner's claims. One is for claims arising in a foreign country. A second excludes claims arising out of combatant activities of the military or naval forces, or Coast Guard, during time of war. These and other exceptions are too lengthy, specific, and close to the present problem to take away petitioners' judgments. Without resorting to an automatic maxim of construction, such exceptions make it clear to use that Congress knew what it was about when it used the term "any claim." It would be absurd to believe that Congress did not have servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain.

More than the language and framework of the act support this view. There were eighteen tort claims bills introduced in Congress between 1925 and 1935. All but two contained exceptions denying recovery to members of the armed forces. When the present Tort Claims Act was first introduced, the exception concerning servicemen had been dropped. What remained from previous bills was an exclusion of all claims for which compensation was provided by the World War Veterans Act of [June 7] 1924-43 Stat. 607, c 320, 38 U.S.C.A. § 421, 11 FCA title 38, § 421, compensation for injury or death occurring in the first World War. HR 181, 79th Cong. 1st Sess. When HR 181 was incorporated into the Legislative Reorganization Act, the last vestige of the armed forces exception disappeared. 2 SYRACUSE LAW REV. 87, 93, 94.

The government envisages dire consequences should we reverse the judgment. A battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which causes injury, all would ground tort actions against the United States. But we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented. We express no opinion as to it, but we may note that only in this context do *Dobson v. United States* (CCA.2d NY) 27 F.2d 807; *Bradley v. United States* (CCA.2d NY) 151 F.2d 742; and *Jefferson v. United States* (D.C. Md.) 77 F. Supp. 706, have any relevance. See the similar distinction in 32 U.S.C.A. § 223b, 9 FCA, title 31, § 223b. Interpretation of the same words may vary, of course, with the consequences, for those consequences may provide insight for determination of congressional purpose. *Lawson v. Suwannee Fruit & S.S. Co.,* 33 U.S. 198, *ante*, 611, 69 S.Ct. 503. The government's fears may have point in reflecting congressional purpose to leave injuries incident to service where they were, despite literal language and other considerations to the contrary. The result may be so outlandish

that even the factors we have mentioned would not permit recovery. But that is not the case before us.

Provisions in other statutes for disability payments to servicemen, and gratuity payments to their survivors, 38 U.S.C.A. § 701, 11 FCA title 38, § 701, indicate no purpose to forbid tort actions under the Tort Claims Act. Unlike the usual workman's compensation statute, *e.g.,* 33 U.S.C.A. § 905, 10 FCA title 22, § 905, there is nothing in the Tort Claims Act or the veterans' laws which provides for exclusiveness of remedy. *United States v. Standard Oil Co.,* 332 U.S. 301, 91 L.Ed. 2067, 67 S.Ct. 1604, indicates that, so far as third party liability is concerned. Nor did Congress provide for an election of remedies, as in the Federal Employees' Compensation Act, 5 U.S.C.A. § 757, 2 FCA title 5, § 757. Thus *Dahn v. Davis*, 258 U.S. 421, 66 L.Ed. 696, 42 S.Ct. 320, and cases following that decision, are not on point. *Compare Parr v. United States* (CAA 10th Kan.) 172 F.2d 462. We will not call either remedy in the present case exclusive, nor pronounce a doctrine of election of remedies, when Congress has not done so. *Compare* 31 U.S.C.A. § 224b, 9 FCA title 31, § 224b, specifically repealed by the Tort Claims Act, § 424(a). In the very Act we are construing, Congress provided for exclusiveness of the remedy in three instances, §§ 403(b), 410(b), and 423, and omitted any provisions which would govern this case.

But this does not mean that the amount payable under the servicemen's benefit laws should not be deducted, or taken into consideration, when the serviceman obtains judgment under the Tort Claims Act. Without the benefit of argument in this Court, or discussions of the matter in the Court of Appeals, we now see no indication that Congress meant the United States to pay twice for the same injury. Certain elements of tort damages may be the equivalent of elements taken into account in providing disability payments. It would seem incongruous, at first glance, if the United States should have to pay in tort for hospital expenses it has already paid, for example. And whatever the legal theory behind a wrongful death action, the same considerations might apply to the government's gratuity death payment to Arthur Brooks' survivors, although national service life insurance might be considered a separate transaction, unrelated to an action in tort or other benefits.

But the statutory scheme and the Veterans' Administration regulations may dictate a contrary result. The point was not argued in the case as it came to us from the Court of Appeals. The court below does not appear to have passed upon it; it was unnecessary, in the view they took of the case. We do not know from this record whether the government objected to this portion of the District Court judgment--nor can we tell from this record whether the Court of Appeals should consider a general objection to the judgment sufficient to allow it to consider this problem. Finally, we are not sure how much deducting the District Court did. It is obvious that we are in no position to pass upon the question of deducting other benefits in the case's present posture.

We conclude that the language, framework, and legislative history of the Tort Claims Act require a holding that petitioners' actions were well founded. But we remand to the Court of Appeals for its consideration of the problem of reducing damages *pro tanto*, should it decide that such consideration is proper in view of the District Court judgment and the parties' allegation of error.

Reversed and remanded.

Mr. Justice Frankfurter and Mr. Justice Douglas dissent, substantially for the reasons set forth by Judge Dobie, below, 169 F.2d 840.

The next case, comprised of three separate cases, presented the "wholly different case" not decided in *Brooks*. Two of the cases involved malpractice by military doctors on active duty servicemen, and the third arose out of a barracks fire that killed plaintiff's decedent. In all three cases, a government actor was clearly culpable. The Supreme Court granted *certiorari* and consolidated them into one decision. The resulting ruling is now known as the "*Feres* doctrine."

Feres v. United States
340 U.S. 135 (1950)

Mr. Justice Jackson delivered the opinion of the Court.

A common issue arising under the Tort Claims Act, as to which Courts of Appeal are in conflict, makes it appropriate to consider three cases in one opinion.

The *Feres* case: The District Court dismissed an action by the executrix of Feres against the United States to recover for death caused by negligence. Decedent perished by fire in the barracks at Pine Camp, New York, while on active duty in the service of the United States. Negligence was alleged in quartering him in barracks known or which should have been known to be unsafe because of a defective heating plant, and in failing to maintain an adequate fire watch. The Court of Appeals, Second Circuit, affirmed.

The *Jefferson* case: Plaintiff, while in the Army, was required to undergo an abdominal operation. About eight months later, in the course of another operation after plaintiff was discharged, a towel 30 inches long

by 18 inches wide, marked "Medical Department U.S. Army," was discovered and removed from his stomach. The complaint alleged that it was negligently left there by the army surgeon. The District Court, being doubtful of the law, refused without prejudice the government's pretrial motion to dismiss the complaint. After trial, finding negligence as a fact, Judge Chestnut carefully reexamined the issue of law and concluded that the Act does not charge the United States with liability in this type of case. The Court of Appeals, Fourth Circuit, affirmed.

The *Griggs* case: The District Court dismissed the complaint of Griggs' executrix, which alleged that while on active duty he met death because of negligent and unskillful medical treatment by army surgeons. The Court of Appeals, Tenth Circuit, reversed and one judge dissenting, held that the complaint stated a cause of action under the Act.

The common fact underlying the three cases is that each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces. The only issue of law raised is whether the Tort Claims Act extends its remedy to one sustaining "incident to the service" what under other circumstances would be an actionable wrong. This is the "wholly different case" reserved from our decision in *Brooks v. United States*, 337 U.S. 49, 52.

There are few guiding materials for our task of statutory construction. No committee reports or floor debates disclose what effect the statute was designed to have on the problem before us, or that it even was in mind. Under these circumstances, no conclusion can be above challenge, but if we misinterpret the Act, at least Congress possesses a ready remedy.

We do not overlook considerations persuasive of liability in these cases. The Act does confer district court jurisdiction generally over claims for money damages against the United States founded on negligence. 28 U.S.C.A. § 1346(2)(b), FCA title 28, § 1346(2)(b). It does contemplate that the government will sometimes respond for negligence of military personnel, for it defines "employee of the government" to include "members of the military or naval forces of the United States," and provides that "acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in "line of duty." 28 U.S.C.A. § 2671, FCA title 28, § 2671. Its exceptions might also imply inclusion of claims such as we have here. 28 U.S.C.A. § 2680(j), FCA title 28, § 2680(j) except "any claim arising out of the <u>combatant</u> activities of the military or naval forces, or the Coast Guard, <u>during time of war</u>" (emphasis supplied), from which it is said we should infer allowance of claims arising from noncombatant activities in peace. Section 2680(k) excludes "any claim arising in a foreign country." Significance also has been attributed in these cases, as in the *Brooks* case, *supra* (337 U.S. p. 51, 93 L.Ed. 1203, 90 S.Ct. 918, 25 NCCA NA 1), to the fact that eighteen tort bills were introduced in Congress between 1925 and 1935 and all but two expressly denied recovery to members of the armed forces; but the bill enacted as the present Tort Claims Act from

its introduction made no exception. We are also reminded that the *Brooks* case, in spite of its reservation of service-connected injuries, interprets the Act to cover claims not incidental to service, and it is argued that much of its reasoning is as apt to impose liability in favor of a man on duty as in favor of one on leave. These considerations, it is said, should persuade us to cast upon Congress, as author of the confusion, the task of qualifying and clarifying its language if the liability here asserted should prove so depleting of the public treasury as the government fears.

This Act, however, should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the government to make a workable, consistent and equitable whole. The Tort Claims Act was not an isolated and spontaneous flash of congressional generosity. It marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit. While the political theory that the King could do no wrong was repudiated in America, a legal doctrine derived from it that the Crown is immune from any suit to which it has not consented was invoked on behalf of the Republic and applied by our courts as vigorously as it had been on behalf of the Crown. As the Federal government expanded its activities, its agents caused a multiplying number of remediless wrongs--wrongs which would have been actionable if inflicted by an individual or corporation but remediless solely because their perpetrator was an officer or employee of the government. Relief was often sought and sometimes granted through private bills in Congress, the number of which steadily increased as government activity increased. The volume of these private bills, the inadequacy of congressional machinery for determination of facts, the importunities to which claimants subjected members of Congress, and the capricious results, led to a strong demand that claims for tort wrongs be submitted to adjudication. Congress already had waived immunity and made the government answerable for breaches of contracts and certain other types of claims. At last, in connection with the Reorganization Act, it waived immunity and transferred the burden of examining tort claims to the courts. The primary purpose of the Act was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional. Congress was suffering from no plague of private bills on behalf of military and naval personnel, because a comprehensive system of relief had been authorized for them and their dependents by statute.

Looking to the detail of the Act, it is true that it provides, broadly, that the District Court "shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . ." This confers jurisdiction to render judgment upon all such claims. But it does not say that all claims must be allowed. Jurisdiction is necessary to deny a claim on its merits as a matter of law as much as to adjudge that liability exists. We interpret this language to mean all it says, but no more. Jurisdiction of the defendant now exists where the defendant was immune from suit before; it remains for courts, in exercise of their jurisdiction, to determine whether any claim is recognizable law.

For this purpose, the Act goes on to prescribe the test of allowable claims, which is "The United States shall be liable, . . . in the same manner and to the same extent as a private individual under the circumstances . . ." with certain exceptions not material here. 28 U.S.C.A. § 2674, FCA title 28, § 2674. It will be seen that this is not the creation of new causes of action but acceptance of liability under circumstance that would bring private liability into existence. This, we think, embodies the same idea that its English equivalent enacted in 1947 (Crown Proceedings Act 1947; 10 & 11 Geo. VI, ch. 44, p. 863), expressed, "Where any person has a claim against the Crown after the commencement of this Act, and, if this Act had not been passed, the claim might have been enforced, subject to the grant . . . of consent to be sued, the claim may now be enforced without specific consent." One obvious shortcoming in these claims is that plaintiffs can point to no liability of a "private individual" even remotely analogous to that which they are asserting against the United States. We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officer or the government he is serving. Nor is there any liability "under like circumstances," for no private individual has power to conscript or mobilize a private army with such authorities over persons as the government vests in echelons of command. The nearest parallel, even if we were to treat "private individual" as including a state, would be the relationship between the states and their militia. But if we indulge plaintiffs the benefit of this comparison, claimants cite us no state, and we know of none which has permitted members of its militia to maintain tort actions for injuries suffered in the service, and in at least one state the contrary has been held to be the case. It is true that if we consider relevant only part of the circumstances and ignore the status of both the wronged and the wrong-doer in these cases we find analogous private liability. In the usual civilian doctor and patient relationship, there is a course of liability for malpractice. And a landlord would undoubtedly be held liable if an injury occurred to a tenant as the result of a negligently maintained heating plant. But the liability assumed by the government here is that created by "all the circumstances," not that which a few of the circumstances might create. We find no parallel liability before and we think no new one has been created by this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the government with novel and unprecedented liabilities.

It is not without significance as to whether the Act should be construed to apply to service-connected injuries that it makes " . . . the law where the act or omission occurred" govern any consequent liability. 28 U.S.C.A. § 1346(2)(b), FCA title 28, § 1346(2)(b). This provision recognizes and assimilates into federal law the rules of substantive law of the several states, among which divergences are notorious. This perhaps is fair enough when the claimant is not on duty or is free to choose his own habitat and thereby limit the jurisdiction in which it will be possible for federal activities to cause him injury. That his tort claims would be governed by the law of the location where he has elected to be is just as fair when the defendant is the government as when the defendant is a private individual. But a soldier on active duty has no such choice and

must serve any place or, under modern conditions, any number of places in quick succession in the forty-eight States, the Canal Zone, or Alaska, or Hawaii, or any other Territory of the United States. That the geography of an injury should select the law to be applied to his tort claims makes no sense. We cannot ignore the fact that most states have abolished the common-law action for damages between employer and employee and superseded it with workmen's compensation statutes which provide, in most instances, the sole basis of liability. Absent this, or where such statutes are inapplicable, states have differing provisions as to limitations of liability and different doctrines as to assumption of risk, fellow-servant rules and contributory or comparative negligence. It would hardly be a national plan of providing for those disabled in service by others in service to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value.

The relationship between the government and members of its armed forces is "distinctly federal in character," as this Court recognized in *United States v. Standard Oil Co.,* 332 U.S. 301, 91 L.Ed. 2067, 67 S.Ct. 1604, wherein the government unsuccessfully sought to recover for losses incurred by virtue of injuries to a soldier. The considerations which lead to that decision apply with even greater force to this case: ". . . To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents, and consequences of the relation between persons in service and the government are fundamentally derived from federal sources and governed by federal authority. *See Tarbel's Case*, 13 Wall 397; *Kurtz v. Moffitt*, 115 U.S. 487. . . ."

No federal law recognizes recovery such as claimants seek. The Military Personnel Claims Act, 31 U.S.C.A. § 223(b), FCA title 31 § 223(b) (now superseded by 28 U.S.C.A. § 2671), permitted recovery in some circumstances, but it specifically excluded claims of military personnel "incident to their service."

This Court in deciding claims for wrong incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactment by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services. We might say that the claimant may (a) enjoy both types of recovery, or (b) elect which to pursue, thereby waiving the other, or (c) pursue both, crediting the larger liability with the proceeds of the smaller, or (d) that the compensation and pension remedy excludes the tort remedy. There is as much statutory authority for one as for another of these conclusions. If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other. The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service.

A soldier is at peculiar disadvantage in litigation. Lack of time and money, the difficulty if not impossibility of procuring witnesses, are only a few of the factors working to his disadvantage. And the few cases charging superior officers or the government with neglect or misconduct which have been brought since the Tort Claims Act of which the present are typical, have either been suits by widows or surviving dependents, or have been brought after the individual was discharged. The compensation system, which normally requires no litigation, is not negligible or niggardly, as these cases demonstrate. The recoveries compare extremely favorably with those provided by most workmen's compensation statutes. In the *Jefferson* case, the District Court considered actual and prospective payments by the Veterans Administration as diminution of verdict. Plaintiff received $3,645.50 to the date of the court's computation and on estimated life expectancy under existing legislation would prospectively receive $31,947 in addition. In the *Griggs* case, the widow, in the two year period after her husband's death, received payments in excess of $2,100. In addition she received $2,695 representing the six months' death gratuity under the Act of December 17, 1943 as amended, 41 Stat. 367, ch. 6 [Dec. 17, 1943] 47 Stat. 599, ch. 343, 10 U.S.C.A. § 903, FCA title 10, § 903. It is estimated that her total future pension payments will aggregate $18,000. Thus the widow will receive an amount in excess of $22,000 from government gratuities, whereas she sought and could seek under state law only $15,000, the maximum permitted by Illinois for death.

It is contended that all these considerations were before the Court in the *Brooks* case and that allowance of recovery to Brooks requires a similar holding of liability here. The actual holding in the *Brooks* case can support liability here only by ignoring the vital distinction there stated. The injury to Brooks did not arise out of or in the course of military duty. Brooks was on furlough, driving along the highway, under compulsion of no orders or duty and on no military mission. A government-owned and operated vehicle collided with him. Brooks' father, riding in the same car, recovered for his injuries and the government did not further contest the judgment but contended that there could be no liability to the sons, solely because they were in the Army. This Court rejected the contention, primarily because Brooks' relationship while on leave was not analogous to that of a soldier injured while performing duties under orders.

We conclude that the government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arose out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command. Accordingly, the judgments in the *Feres* and *Jefferson* cases are affirmed and that in the *Griggs* case is reversed.

. . .

In the years that followed the *Feres* decision, three broad rationales were asserted to justify the doctrine:

> In the last analysis, *Feres* seems best explained by the 'peculiar and special relationship of a soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of duty.'[24]

In determining whether a military plaintiff was injured "incident to service" and thus barred from bringing a claim under the FTCA, courts have usually considered three factors: (1) the function or activity being performed at the time of the injury; i.e., whether the plaintiff was engaged in some military-related activity, using a facility, taking advantage of a privilege, or enjoying a benefit available because of his military status[25]; (2) the situs of the injury; i.e., whether the plaintiff was on or off the military installation when the injury occurred; and (3) the duty status of the plaintiff at the time of the injury; i.e., whether on duty or on pass, leave, or

[24] United States v. Muniz, 374 U.S. 150, 162 (1963) (quoting *United States v. Brown*, 348 U.S. 110, 112 (1954)).

[25] Jones v. United States, 112 F.3d 299 (7th Cir. 1997) (soldier's claim for improper surgery at Letterman AMC while he was at Olympic tryout is *Feres* barred); Chambers v. United States, 357 F.2d 224 (8th Cir. 1966) (injury from base recreational activity is *Feres* barred); Knight v. United States, 361 F. Supp. 708 (W.D. Tenn. 1972), *aff'd*, 480 F.2d 927 (6th Cir. 1973); *but see* Dreir v. United States, 106 F.3d 844 (9th Cir. 1996) (soldier on afternoon off on recreational outing with other soldiers drowns in downhill channel at Fort Lewis water treatment facility--*Feres* not applicable).

furlough.[26] Various courts dismiss FTCA claims, citing any one of these factors as controlling in the "incident to service" analysis.[27]

The so-called "traditional factors" are not, however, a talisman that dictates the result in all cases. The inquiry is not: "Where was the service member when the injury occurred, what function was he performing, and what was his duty status?" The analysis must instead focus on the ultimate issue of: "Was the plaintiff injured 'incident to service?'" The Supreme Court dealt with the "incident to service" question in the absence of "traditional factors" in the following case.

Shearer v. United States
473 U.S. 52 (1985)

[The mother of PVT Vernon Shearer, a Fort Bliss soldier who was killed by PVT Andrew Heard while the two were on leave in New Mexico, filed suit against the United States alleging that the Army's negligence in failing to discharge PVT Heard when they knew of his dangerous propensities was the cause of her son's death. PVT Heard had been previously convicted by a German court and served time in German prison for homicide. After his release from prison he was reassigned to the United States but had not been discharged. The district court dismissed the action and the Third Circuit reversed. The circuit court reasoned that since the actual injury, the death of Shearer, took place off the installation while the soldiers were on authorized leave, and since at the time of his death Shearer was not engaged in any sort of military activity or using any military benefit or facility, the *Feres* doctrine did not bar the action.]

II

> Our holding in *Feres v. United States*, 340 U.S. 135 (1950), was that a soldier may not recover under the Federal Tort Claims Act for injuries which "arise out of or are in the course of activity incident to service." *Id*., at 146. Although the Court in *Feres* based its decision on several grounds,

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[26] *See, e.g.,* Elliot v. United States, 13 F.3d 1555 (11th Cir. 1994), *aff'd en banc,* 37 F.3d 617 (11th Cir. 1994); Thompson v. United States, 8 F.3d 30 (9th Cir. 1993), *cert. denied,* 510 U.S. 1911 (1994); Coltrain v. United States, 999 F.2d 542 (9th Cir. 1993); Shaw v. United States, 854 F.2d 360 (10th Cir. 1988); Pierce v. United States, 813 F.2d 349 (11th Cir. 1987); Bon v. United States, 802 F.2d 1092 (9th Cir. 1986); Flowers v. United States, 764 F.2d 759 (11th Cir. 1985); Warner v. United States, 720 F.2d 837 (5th Cir. 1983); Parker v. United States, 611 F.2d 1007 (5th Cir. 1980); Uptegrove v. United States, 600 F.2d 1248 (9th Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980).

[27] For a matrix that includes the factors mentioned above and the decisions of courts in 17 representative cases, *see* Flowers v. United States, 764 F.2d 759, 762-63 (11th Cir. 1985).

> [i]n the last analysis, *Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.' *United States v. Muniz*, 374 U.S. 150, 162 91963), quoting *United States v. Brown*, 348 U.S. 110, 112 (1954).

The *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases. Here, the Court of Appeals placed great weight on the fact that Private Shearer was off duty and away from the base when he was murdered. But the situs of the murder is not nearly as important as whether the suit requires the civilian court to second-guess military decisions, *see Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673 (1977), and whether the suit might impair essential military discipline, *see Chappell v. Wallace*, 462 U.S. 296, 300, 304 (1983).

Respondent's complaint strikes at the core of these concerns. In particular, respondent alleges that Private Shearer's superiors in the Army "negligently and carelessly failed to exert reasonably sufficient control over Andrew Heard, . . . failed to warn other persons that he was at large, [and] negligently and carelessly failed to . . . remove Andrew Heard from active military duty." App. 14. This allegation goes directly to the "management" of the military; it calls into question basic choices about the discipline, supervision, and control of a serviceman.

Respondent's case is therefore quite different from *Brooks v. United States*, 337 U.S. 49 (1949), where the Court allowed recovery under the Tort Claims Act for injuries caused by a negligent driver of a military truck. Unlike the negligence alleged in the operation of a vehicle, the claim here would require Army officers "to testify in court as to each others decisions and actions." *Stencel Aero Engineering Corp. v. United States, supra* at 673. To permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions; for example whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether and how to place restraints on a soldier's off-base conduct. But as we noted in *Chappell v. Wallace*, such " 'complex, subtle, and professional decisions as to the composition, training, . . . and control of a military force are essentially professional military judgments.' " 462 U.S. at 302, quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

Finally, respondent does not escape the *Feres* net by focusing only on this case with a claim of negligence, and by characterizing her claim as a challenge to a "straightforward personnel decision." Tr. of oral Arg. 37. By whatever name it is called, it is a decision of command. The

plaintiffs in *Feres* and *Stencel Aero Engineering*, did not contest the wisdom of broad military policy; nevertheless, the Court held that their claims did not fall within the Tort Claims Act because they were the type of claims that, if generally permitted would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness. Similarly, respondent's attempt to hale Army officials into court to account for their supervision and discipline of Private Heard must fail.

III

Special Assistant to the Attorney General Holtzoff, testifying on behalf of the Attorney General, described the proposed Federal Tort Claims Act as "a radical innovation" and thus counseled Congress to "take it step by step." Tort Claims Against the United States: Hearings on H.R. 7236 before Subcommittee No. 1 of the House Committee on the Judiciary, 76th Cong., 3d Sess., 22 (1940). We hold that Congress has not undertaken to allow a serviceman or his representative to recover from the government for negligently failing to prevent another serviceman's assault and battery. Accordingly, the judgment of the Court of Appeals is Reversed.

Some lower courts read the *Shearer* decision as abandoning traditional *Feres* analysis and sanctioning an *ad hoc* determination of whether a particular case would have an adverse impact upon military discipline.[28] The Court corrected that misperception in *United States v. Johnson.*[29]

United States v. Johnson
481 U.S. 681 (1987)

Justice Powell delivered the opinion of the Court.

This case presents the question whether the doctrine established in *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950) bars an action under the Federal Tort Claims Act on behalf of a service

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[28] *See, e.g.,* Atkinson v. United States, 804 F.2d 561, 563 (9th Cir. 1986) ("Because *Shearer* makes clear that the paramount concern is with the military decisions or discipline, in each case, we must determine the effect of a particular suit on military decisions or discipline"), *modified,* 813 F.2d 1006 (9th Cir.), *rev'd on rehearing,* 825 F.2d 202 (9th Cir. 1987); Johnson v. United States, 779 F.2d 1492, 1493-94 (11th Cir. 1986) ("[*Shearer* places special emphasis] . . . upon military discipline and whether or not the claim being considered would require civilian courts to second-guess military decisions"), *rev'd sub nom,* 481 U.S. 681 (1987).

[29] 481 U.S. 681 (1987).

member killed during the course of an activity incident to service, where the complaint alleges negligence on the part of civilian employees of the Federal government.

I

Lieutenant Commander Horton Winfield Johnson was a helicopter pilot for the United States Coast Guard, stationed in Hawaii. In the early morning of January 7, 1982, Johnson's Coast Guard station received a distress call from a boat lost in the area. Johnson and a crew of several other Coast Guard members were dispatched to search for the vessel. Inclement weather decreased the visibility, and so Johnson requested radar assistance from the Federal Aviation Administration (FAA), a civilian agency of the Federal government. The FAA controllers assumed positive radar control over the helicopter. Shortly thereafter, the helicopter crashed into the side of a mountain on the island of Molokai. All the crew members, including Johnson, were killed in the crash.

Respondent, Johnson's wife, applied for and received compensation for her husband's death pursuant to the Veterans' Benefits Act, 72 Stat. 1118, as amended, 38 U.S.C. § 301 *et seq*. (1982 ed. and Supp. III). In addition, she filed suit in the United States District Court for the Southern District of Florida under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346, 2671-2680. Her complaint sought damages from the United States on the ground that the FAA flight controllers negligently caused her husband's death. The government filed a motion to dismiss, asserting that because Johnson was killed during the course of his military duties, respondent could not recover damages from the United States. The District Court agreed and dismissed the complaint, relying exclusively on this Court's decision in *Feres*.

The Court of Appeals for the Eleventh Circuit reversed. 749 F.2d 1530 (CA 11 1985). It noted the language of *Feres* that precludes suits by service members against the government for injuries that "arise out of or are in the course of activity incident to service." 340 U.S., at 146, 71 S.Ct., at 159. The court found, however, that the evolution of the doctrine since the *Feres* decision warranted a qualification of the original holding according to the alleged status of the tortfeasor. The court identified what it termed "the typical *Feres* factual paradigm" that exists when a service member alleges negligence on the part of another member of the military. 749 F.2d, at 1537. "[W]hen the *Feres* factual paradigm is present, the issue is whether the injury arose out of or during the course of an activity incident to service." *Ibid*. But when negligence is alleged on the part of a Federal government employee who is not a member of the military, the court found that the propriety of a suit should be determined by examining the rationales that underlie the *Feres* doctrine. Although, it noted that this Court has articulated numerous rationales for the doctrine, it found the effect of a suit on military discipline to be the doctrine's primary justification.

Applying its new analysis to the facts of his case, the court found "absolutely no hint . . . that the conduct of any alleged tortfeasor even

remotely connected to the military will be scrutinized if this case proceeds to trial." 749 F.2d at 1539. Accordingly, it found that *Feres* did not bar respondent's suit.

. . . .

The Court of Appeals granted the government's suggestion for rehearing en banc. The en banc court found that this Court's recent decision in *United States v. Shearer*, 473 U.S. 52, 105 S.Ct. 1019, 87 L.Ed.2d 38 (1985) "reinforc[ed] the analysis set forth in the panel opinion," 779 F.2d 1492, 1493 (CA 11 1986) (*per curiam*), particularly the "[s]pecial emphasis . . . upon military discipline and whether or not the claim being considered would require civilian courts to second-guess military decisions," *Id*., at 1493-1494. It concluded that the panel properly had evaluated the claim under *Feres* and therefore reinstated the panel opinion. Judge Johnson, joined by three other judges, strongly dissented. The dissent rejected the "*Feres* factual paradigm" as identified by the court, finding that because "Johnson's injury was undoubtedly sustained incident to service, . . . under current law our decision ought to be a relatively straightforward affirmance." *Id*., at 1494.

We granted certiorari, 479 U.S. 811, (1986), to review the Court of Appeals' reformulation of the *Feres* doctrine and to resolve the conflict among the Circuits on this issue. We now reverse.

II

In *Feres*, this Court held that service members cannot bring tort suits against the government for injuries that "arise out of or are in the course of activity incident to service." 340 U.S., at 146, 71 S.Ct., at 159. This Court has never deviated from this characterization of the *Feres* bar. Nor has Congress changed this standard in the close to 40 years since it was articulated, even though, as the Court noted in *Feres*, Congress "possesses a ready remedy" to alter a misinterpretation of its intent. *Id*., at 138, 71 S.Ct., at 155. Although all of the cases decided by this Court under *Feres* have involved allegations of negligence on the part of members of the military, this Court has never suggested that the military status of the alleged tortfeasor is crucial to the application of the doctrine. Nor have lower courts understood this fact to be relevant under *Feres*. Instead, the *Feres* doctrine has been applied consistently to bar all suits on behalf of service members against the government based upon service-related injuries. We decline to modify the doctrine at this late date.

A

This Court has emphasized three broad rationales underlying the *Feres* decision. *See Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 671-673, 97 S.Ct. 2054, 2057-2058, 52 L.Ed.2d 665 (1977), and n.2, *supra*. An examination of these reasons for the doctrine demonstrates that the status of the alleged tortfeasor does not have the critical significance ascribed to it by the Court of Appeals in this case. First, "[t]the relationship between the government and members of its armed forces is 'distinctly federal in character.' " *Feres*, 340 U.S., at 143, 71 S.Ct., at 158 (quoting *United States v. Standard Oil Co.,* 332 U.S. 301,

305, 67 S.Ct. 1604, 1606, 91 L.Ed. 2067 (1947)). This federal relationship is implicated to the greatest degree when a service member is performing activities incident to his federal service. Performance of the military function in diverse parts of the country and the world entails a "[s]ignifcant risk of accidents and injuries." *Stencel Aero Engineering Corp. v. United States, supra,* 431 U.S., at 672, 97 S.Ct., at 2058. Where a service member is injured incident to service--that is, because of his military relationship to the government--it "makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the government to [the] serviceman." *Ibid*. Instead, application of the underlying federal remedy that provides "simple, certain, and uniform compensation for injuries or death of those in armed services," *Feres, supra*, 340 U.S., at 144, 71 S.Ct., at 158 (footnote omitted), is appropriate.

Second, the existence of these generous statutory disability and death benefits is an independent reason why the *Feres* doctrine bars suit for service-related injuries. In *Feres*, the Court observed that the primary purpose of the FTCA "was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional." 340 U.S., at 140, 71 S.Ct., at 156. Those injured during the course of activity incident to service not only receive benefits that "compare extremely favorably with those provided by most workmen's compensation statutes," *Id*., at 145, 71 S.Ct., at 159, but the recovery of benefits is "swift [and] efficient," *Stencel Aero Engineering Corp. v. United States, supra*, 431 U.S., at 673, 97 S.Ct., at 2058, "normally requir[ing] no litigation," *Feres*, *supra*, 340 U.S., at 145, 71 S.Ct., at 159. The Court in *Feres* found it difficult to believe that Congress would have provided such a comprehensive system of benefits while at the same time contemplating recovery for service-related injures under the FTCA. Particularly persuasive was the fact that Congress "omitted any provision to adjust these two types of remedy to each other." *Id*., at 144, 71 S.Ct., at 158. Congress still has not amended the Veterans' Benefits Act or the FTCA to make any such provision for injuries incurred during the course of activity incident to service. We thus find no reason to modify what the Court has previously found to be the law: the statutory veterans' benefits "provid[e] an upper limit of liability for the government as to service-connected injuries. *Stencel Aero Engineering Corp. v. United States, supra*, 431 U.S., at 673, 97 S.Ct., at 2059. *See Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 464, 100 S.Ct. 647, 650, 62 L.Ed.2d 614 (1980) (*per curiam*) ("[T]he Veterans' Benefits Act provided compensation to injured servicemen, which we understood Congress intended to be the sole remedy for service-connected injuries").

Third, *Feres* and its progeny indicate that suits brought by service members against the government for injuries incurred incident to service are barred by the *Feres* doctrine because they are the "type[s] of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *United States v. Shearer*, 473 U.S., at 59, 105 S.Ct., at 3044 (emphasis in original). In every respect the military is, as this Court has recognized, "a specialized society." *Parker v. Levy*, 417 U.S. 733, 743, 94 S.Ct. 2547,

2555, 41 L.Ed.2d 439 (1974). "[T]o accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). Even if military negligence is not specifically alleged in a tort action, a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission. Moreover, military discipline involves not only obedience to orders, but more generally duty and loyalty to one's service and to one's country. Suits brought by service members against the government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word.

B

In this case, Lieutenant Commander Johnson was killed while performing a rescue mission on the high seas, a primary duty of the Coast Guard. *See* 14 U.S.C. §§ 2, 88(a)(1). There is no dispute that Johnson's injury arose directly out of the rescue mission, or that the mission was an activity incident to his military service. Johnson went on the rescue mission specifically because of his military status. His wife received and is continuing to receive statutory benefits on account of his death. Because Johnson was acting pursuant to standard operating procedures of the Coast Guard, the potential that this suit could implicate military discipline is substantial. The circumstances of this case thus fall within the heart of the *Feres* doctrine as it consistently has been articulated.

III

We affirm the holding of *Feres* that "the government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S., at 146, 71 S.Ct, at 159. Accordingly, we reverse the judgment of the Court of Appeals for the Eleventh Circuit and remand for proceedings consistent with this opinion.
It is so ordered.

Justices Brennan, Marshall, and Stevens joined Justice Scalia in an often-cited and powerful dissent to *Johnson*. The dissent stopped just short of advocating a total reversal of

Feres, although it described that case as "our clearly wrong decision in *Feres*."[30] Despite this dissent, the circuit courts have continued to apply the *Johnson* analysis.[31]

The *Feres* doctrine also extends to reservists[32] and National Guardsmen when engaged in guard activities,[33] service academy[34] cadets,[35] Public Health Service officers,[36] foreign military members in the United States training with U.S. forces,[37] and service members on the Temporary Disability Retired List.[38] *Feres* does not bar the tort claims of military veterans if the

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[30] United States v. Johnson, 481 U.S. 681, 703 (1987).

[31] *See, e.g.,* Borden v. Veterans Admin., 41 F.3d 763 (1st Cir. 1994) (medical treatment in MTF invokes *Feres*); Stephenson v. Stone, 21 F.3d 159 (7th Cir. 1994) (soldier murdered by NCO in barracks); Jackson v. Brigle, 17 F.3d 280 (9th Cir. 1994), *cert. denied*, 513 U.S. 868 (1994); Hayes v. United States, 44 F.3d 377 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 66 (1996) (finding death from medical malpractice during elective surgery is *Feres* barred); Lauer v. United States, 968 F.2d 1428 (1st Cir. 1992), *cert. denied,* 506 U.S. 1033 (1992) (sailor struck by GOV while walking on off-base access road maintained and patrolled by Navy is barred); Kitowski v. United States, 931 F.2d 1526 (11th Cir. 1991), *cert. denied*, 502 U.S. 938 (1991) (*Feres* applies to deliberate drowning of Navy trainee by instructors during training).

[32] Bednasowicz v. United States, 1997 WL 665792 (N.D. Ill.) (*Feres* bars action by reservist for wrongful discharge, which is heartland *Feres* by its nature); Wake v. United States, 89 F.3d 53 (2nd Cir. 1996) (inactive reservist who is member of senior Naval ROTC is injured while traveling in a van driven by a U.S. Marine on trip back to college after undergoing pre-commissioning physical--*Feres* applies).

[33] Quintana v. United States, 997 F.2d 711 (10th Cir. 1993); Duffy v. United States, 966 F.2d 307 (7th Cir. 1992); Loughney v. United States, 839 F.2d 186 (3d Cir. 1988); Henry v. Textron, Inc., 577 F.2d 1163 (4th Cir.), *cert. denied*, 439 U.S. 1047 (1978); Misko v. United States, 453 F. Supp. 513 (D. D.C. 1978). *See also* H.R. Rep. No. 384, 97th Cong., 1st Sess. 5 (1981).

[34] Miller v. United States, 42 F.3d 297 (5th Cir. 1995); Collins v. United States, 642 F.2d 217 (7th Cir. 1981); Archer v. United States, 217 F.2d 545 (9th Cir. 1954), *cert. denied*, 348 U.S. 953 (1955).

[35] The bar has also been applied to ROTC cadets. *See* Wake v. United States, 89 F.3d 53 (2d Cir. 1996) (noting that the *Feres* bar applies to individuals on reserve status, as well as to cadets in U.S. military academies, the court found that a member of the U.S. Navy Reserve Officers Training Corps (NROTC) was barred by *Feres* from pursuing a claim for injuries suffered when returning from a flight physical examination).

[36] Scheppan v. United States, 810 F. 2d 461 (4th Cir. 1987).

[37] Doberkow v. United States, 581 F.2d 785 (9th Cir. 1978).

[38] Ricks v. United States, 842 F.2d 300 (11th Cir. 1988), *cert. denied,* 490 U.S. 1031 (1988). *Contra* Cortez v. United States, 854 F.2d 723 (5th Cir. 1988); Rinelli v. United States, 706 F. Supp. 190 (E.D. N.Y. 1988).

tortious act occurred after the claimant left military duty.[39] The key issue is whether the alleged injury is separate and distinct from any acts before discharge.[40] This exception allows veterans receiving treatment in a military medical facility to claim under the FTCA for malpractice.

Another post-discharge tort theory enables claimants to avoid a *Feres* bar based on the government's failure to warn persons of dangerous conditions caused by government actions. This theory is limited to intentional acts by military superiors that expose service members to a risk of harm after discharge, about which the government negligently fails to warn the service member.[41] If the failure to warn is but a continuation of a duty that arose while the individual was on active duty, or was created by negligent, as opposed to intentional acts, the claim is barred.[42] There is also no "federal" common law liability for failure to warn if the cause of action does not exist under state law.[43]

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[39] United States v. Brown, 348 US. 110 (1954); McGowan v. Scoggins, 890 F.2d 128 (9th Cir. 1989) (*Feres* not applicable to assault on retired officer seeking new ID card).

[40] United States v. Stanley, 483 U.S. 669 (1987) (No); M.M.H. v. United States, 966 F.2d 285 (7th Cir. 1992) (Yes).

[41] Cole v. United States, 755 F.2d 873 (11th Cir. 1985) (failure to warn of increased risk of cancer after exposure to high levels of radiation); Thornwell v. United States, 471 F. Supp. 344 (D. D.C. 1979) (soldier given LSD without his knowledge while on active duty and after discharge Army negligently failed to warn him of medical risks or to provide needed medical follow-up).

[42] In Re Agent Orange Product Liability Litigation, 580 F. Supp. 1242 (E.D.N.Y. 1984); Sweet v. United States, 528 F. Supp. 1068 (D.S.D. 1981), *aff'd*, 687 F.2d 246 (1982).

[43] Cole v. United States, 846 F.2d 1290 (11th Cir.), *cert. denied*, 488 U.S. 966 (1988).

D. DERIVATIVE CLAIMS

Feres will generally bar any claim arising out of a soldier's injuries that are incident to service.[44] *Feres* will not, however, bar claims by spouses or dependents who are personally injured by government negligence, regardless of the situs of the injury (medical facilities, recreation areas, etc.).[45] For example, if a soldier acting incident to service and his spouse are injured in an automobile accident due to the negligence of another government driver, either the service member (if state law allows) or the spouse may assert an FTCA claim for losses stemming from the spouse's injuries. Neither party, however, may assert a claim for losses arising from the service member's injuries.

One of the more confusing and controversial applications of the *Feres* bar involves injuries to an unborn fetus. The circuits have split on whether a claim is *Feres* barred as a derivative claim for treatment of the service member mother[46] or valid as an independent right of action for the child.[47]

Similar to derivative claims of dependents are claims for indemnity or contribution for injuries to service members incident to service. In *Stencel Aero Engineering Corp. v. United States*,[48] the Supreme Court applied a "genesis test" and held that the *Feres* doctrine bars third

[44] Grosinsky v. United States, 947 F.2d 417 (9th Cir. 1991).

[45] Portis v. United States, 483 F.2d 670 (4th Cir. 1973). The soldier can also recover on a derivative claim for injuries to family members. Phillips v. United States, 508 F. Supp. 544 (D.S.C. 1981).

[46] Scales v. United States, 685 F.2d 970 (5th Cir. 1982), *cert. denied,* 460 U.S. 1082 (1983).

[47] Del Rio v. United States, 833 F.2d 282 (11th Cir. 1987); Romero by Romero v. United States, 954 F.2d 223 (4th Cir. 1992), *aff'd,* 2 F.3d 1149 (1993).

[48] 431 U.S. 666 (1977).

party claims for contribution and indemnity when the plaintiff in the primary action was barred by the incident to service rule from recovery directly from the United States.[49]

E. OTHER CLAIMANTS

The Anti-Assignment Act prevents assignment of a claim against the United States before the claim is approved and a payment warrant issued.[50] The Act only applies, however, to consensual transactions and not to transfer of rights by operation of law. Claims subrogated by operation of law, such as the claim of an insurance carrier who has paid the injured party, are valid under the FTCA.[51]

The United States is also liable for contribution as a joint tortfeasor to a co-defendant if local law allows.[52] *Feres* will not bar an indemnity daim when the negligence of the United States, and not a co-defendant's negligence, would give rise to an obligation of complete indemnity under local law.[53] For purposes of the statute of limitations, the claim against the

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[49] *See also* Boyle v. United States, 487 U.S. 500 (1988), *cert. denied*, 488 U.S. 994 (1988) (discussing scope of application of government contractor defense); Hercules Inc. v. United States, 24 F.3d 188 (Fed. Cir. 1994), *aff'd*, 116 S. Ct. 981 (1996) (finding government contractor defense inapplicable to settlement by Agent Orange manufacturers with plaintiffs).

[50] 31 U.S.C. § 3727 (1994).

[51] United States v. Shannon, 342 U.S. 288 (1952); United States v. Aetna Casualty Surety Co., 338 U.S. 366 (1949).

[52] Rayonier v. United States, 352 U.S. 315 (1957); United States v. Yellow Cab Co., 340 U.S. 543 (1951); Williams v. United States, 352 F.2d 477 (5th Cir. 1968); Johns-Manville Sales Corp. v. United States, 690 F.2d 721 (9th Cir. 1982) (claimant must receive final judgment and then meet administrative filing requirements).

[53] United Airlines, Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964), *cert. dismissed*, 379 U.S. 951 (1964); Hankinson v. Pennsylvania R.R., 280 F.2d 249 (3d Cir. 1960); Chicago, R.I. & P. Ry. v. United States, 220 F.2d 939 (7th Cir. 1955).

United States does not accrue until the date that the right to contribution or indemnity becomes assertable.[54]

[54] Chicago, R.I. & P. Ry. v. United States, 220 F.2d 939 (7th Cir. 1955); Keleket X-Ray Corp. v. United States, 275 F.2d 167 (D.C. Cir. 1960).